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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/784,980	02/16/2001	Anthony John Bell	5641C1-07-LAV	5253

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EXAMINER

MADSEN, ROBERT A

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 06/19/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/784,980

Applicant(s)

BELL ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 May 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-36 and 46-54 is/are pending in the application.
- 4a) Of the above claim(s) 10-27 and 46-54 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-9 and 28-36 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3.
- 4) ☐ Interview Summary (PTO-413) Paper No(s) _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

DETAILED ACTION

Election/Restrictions

1. Applicant's election of claims 1-9 in Paper No. 6 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)). However, claims 28-36 have been included in Group I and claims 1-9 as they are drawn to the same invention. Claims 10-27, 46-54 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention. Claims 37-45 were cancelled in Paper No. 2.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

3. Claims 1,2,4,6-9 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Cherukuri et al. (US 6482465 B1). See Column 3, lines 55-64, Column 9, line 64 to

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Column 10, line 25, Column 13, lines 24-34. The recited composition does not require a hard boiled confectionery base.

4. Claims 1, 2,4-9,28,29,31-36 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Katsuragi et al. (EP 07332064 A1). See Abstract, Page 3, lines 9-13, Page 3, line 58 to Page 4, line 5, Page 4, lines 25-47.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1,2,4,6-9, 28,29,,31,33-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nakano et al. (JP 09-103275) in view of Cherukuri et al. (US 6482465 B1).

7. Nakano et al. teach forming a microcapsule comprising oils to blend with a botanical (e.g. ginko biloba and valerian as recited in claims 2 and 29) for masking bitterness of the botanical blended with a hard candy (Abstract, English translation Paragraphs 004-0012, 0017-0021,0034). However, Nakano et al. are silent in teaching the particular amount and types of oils as recited in claims 1, 4,6-9 and 28, 31,33-35..

8. Cherukuri et al. teach a confection base comprising a botanical (e.g. ginkoba and St. John's wart) with saturated fats, such as cocoa butter as recited in claims 1,4,6,

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28,31,33 at a level of less than 5% to 0.1-50% of the botanical as recited in claims 7-9,34-36 for masking bitterness (Abstract, Column 9, line 64 to Column 10, line 25, Column 13, lines 24-33,47-65).

9. Therefore, it would have been obvious to modify Nakano et al. and include 0.5 to 5.0 % cocoa butter as recited in claims 1,6,7,28,33,34 to every 0.1 to 50% of botanical, such as ginko biloba, as recited in claims 8,9,35,36 since Cherukuri et al. teach these are effective levels to mask bitterness, and one would have been substituting one type of oil for another for the same purpose.

10. Claims 3 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Katsuragi et al. (EP 0732064 A1) in view of Raymont (AU 9671904 A)

11. Katsuragi et al. teach Ginkgo biloba added to troches, but are silent in teaching a hard candy with Echinacea. Raymont is relied on as evidence of the conventionality of adding ginkgo biloba and Echinacea to lozenges/troches, and further teach Echinacea provides immune system benefits(Page 3, lines 10-31, Page 5, line 22). Therefore, to include Echinacea would have been an obvious matter of choice, depending on the desired benefit of the botanical (e.g. improving the immune system) and one would have been substituting one conventional botanical for another for the same purpose: providing a medical benefit in a hard candy form.

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Conclusion


12. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Tanaka (US 4143162) teaches encapsulating ginseng with a vegetable oil so that it can be added to foodstuff without a strong flavor. Emanuel-King (US 5248503) teaches lozenges with Echinacea.

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

14. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications.

15. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen
Examiner
Art Unit 1761
June 15, 2003


STEVE WEINSTEIN
PRIMARY EXAMINER

For
M. Cano